BALTIM TIMBER SDN. BHD.

v.

THE MINISTER OF RESOURCE PLANNING & 2 ORS.

HIGH COURT, KUCHING
TUAN RICHARD MALANJUM JC.
[ORIGINATING MOTION
NO. KG. 17 OF 1987]
5 NOVEMBER 1992

ADMINISTRATIVE LAW: Revocation of licence - No opportunity to explain the event invalidating the licence - Whether certiorari should be granted - Licence expired - Admission of breach of natural justice.

The applicant was issued with a forest timber licence (said licence) by the 2nd respondent. The duration of the said licence was from 26 May 1981 to 25 May 1991. The said licence was issued subject to terms and conditions set out therein, *inter alia*, it provided that the second respondent may by giving three months notice in writing terminate the said licence in the event of the applicant failing to comply with any of the terms and conditions stipulated therein.

By a letter dated 11 March 1987 written by the second respondent the said licence was revoked. The applicant alleges that it was done unlawfully. The respondents admitted that the applicant was not given an opportunity to explain the event invalidating the licence. On 13 March 1987 a new licence was issued to Sarawak Timber Industries Development Corporation (STIDC) by the 2nd respondent which expired on 25 May 1988.

Held:

[1] A mere admission of invalidity of an impugned decision *ipso facto* does not exclude the discretion of the Court to grant an order of *certiorari*. It depends on the effects of the impugned decision on the applicant if it is not quashed by the Court. Where there could be wider consequences or continuing negative effects upon the applicant even after the admission of invalidity an order of *certiorari* should be granted regardless of the admission. This is more so where third parties are not bound by such an admission resulting in the impugned decision continuing to have adverse effects on the applicant in relation with the third parties.

[2] In the present case however there is no indication or any evidence from the affidavits filed or from the submission of learned Counsel for the applicant which can be considered as the wider consequence or continuing negative effect of the impugned revocation on the applicant if an order of *certiorari* is not granted.

[3] The validity of the revocation of the said licence is no longer in dispute. Therefore in the circumstances it is not necessary and not a condition precedent that an order of *certiorari* should be obtained before the applicant can pursue its claim for damages under private law.

[4] The expiry of a licence or a permit of an applicant does not *per se* exclude the remedy of *certiorari*. Courts have granted the order of *certiorari* although licences or permits have expired. This is particularly so where there may be adverse or wider consequences or continuing negative effects to the applicant if the impugned decision is not quashed. But there is no submission or any evidence adduced in the present case on the adverse or wider consequences or continuing negative effects of the impugned revocation on the applicant if an order of *certiorari* is not granted.

[Application dismissed. No order as to costs].

Cases referred to:

Minister for Resource Planning & Ors. v. Keruntum Sdn. Bhd. [1988] 2 MLJ 226 ***(cit)***

Anisminic v. Foreign Compensation Commission & Anor. [1969] 2 AC 147 ***(cit)***

O'Reilly v. Mackman [1982] 3 All ER 1124 ***(cit)***

B. Mahesan v. K.K. Lim [1987] 1 CLJ 525/[1987] 2 MLJ 160 ***(cit)***

Calvin v. Carr [1980] AC 574 (PC) p. 589 H ***(cit)***

London & Clydeside Estates Ltd. v. Aberdeen District Council & Anor. [1979] 3 All ER 876 ***(cit)***

Forbes v. New South Wales Trotting Club Ltd. [1978-1979] 143 CLR 242 at p. 277 ***(foll)***

R v. Parole Board, ex p Wilson [1992] 2 All ER 576 ***(cit)***

Gouriet v. Union of Post Office Workers [1978] AC 435 at p. 496 ***(cit)***

Cocks v. Thanet District Council [1982] 3 All ER 1135 ***(foll)***

Davy v. Spelthorne Borough Council [1984] 1 AC 262 ***(foll)***

Ratilal Bhogilal Shah v. State of Gujarat & Ors. [1966] AIR Guj. 244 ***(foll)***

Kashi Prasad v. State of Uttar Pradesh [1967] AIR ALL 173 ***(foll)***

Jogesh Chandra Roy v. State of West Bengal & Ors. [1968] AIR Cal. 528 ***(foll)***
K.N. Guruswamy v. The State of Mysore & Ors. [1954] AIR 592 SC ***(foll)***

Legislation referred to:
Forests Ordinance (Cap. 126) s. 55
Rules of the High Court 1980, O. 53 r. (1)(2)
Housing (Homeless Persons) Act 1977 (UK)
Rules of the Supreme Court, O. 53 (UK)

For the applicant - Stanley Eddy, Lee Heng Cheong; M/s. H.C. Lee & Company
For the respondents - J.C. Fong, Lim Heng Choo; State Attorney-General's Chambers

JUDGMENT

Richard Malanjum JC:

The Application

Pursuant to leave granted to the applicant on 8 April 1987 the applicant by a Notice of Motion dated 20 April 1987 applied for orders as follows:

(a) an Order of *Certiorari* to remove into the High Court for the purpose of it being quashed the decision of the second respondent made on 11 March 1987 whereby the second respondent (acting as servant or agent of the first and third respondent) revoked the applicant's Forest Timber Licence No. T/3070;
(b) an Order of prohibition prohibiting the Respondents and each of them from granting any forest timber licence and/or permit over the licensed area delineated in the Forest Timber Licence No. T/3070 except in accordance with clause 16 of the said Forest Timber Licence No. T/3070; and
(c) costs of and occasioned by the motion and the application for leave be paid by the respondents to the applicant to be taxed.

At the commencement of the hearing learned Counsel for the applicant applied to withdraw the application for Order of Prohibition (b) above with the learned State Attorney-General not objecting.

Application for Order of Prohibition as in (b) above was accordingly struck out.

The Grounds:

The grounds upon which the Order of *Certiorari* is sought are as provided in paragraph 3 of the statement dated 30 March 1987 filed pursuant to O. 53 r. (1)(2) of the Rules of the High Court 1980. They are as follows:

(a) that the revocation by the second respondent (acting as servant or agent of the first and third respondents) of the applicant's Forest Timber Licence No. T/3070 by letter dated 11 March 1987 is null and void and of no effect as it was made in violation of the rules of natural justice;
(b) that the applicant had at all material times a legitimate expectation to be heard before the aforesaid revocation which right was denied to it;
(c) that the revocation by the second respondent as aforesaid was made under the dictation of the first respondent or some other authority and is consequently illegal null and void and of no effect as it is contrary to the provisions of the Forests Ordinance (Cap. 126) and/or the terms of the aforesaid Timber Licence No. T/3070;
(d) the second respondent was at all material times under a duty to act fairly. The revocation by the second respondent as aforesaid is in breach of the said duty. Consequently, the second respondent acted in excess of jurisdiction;
(e) that the aforesaid revocation was made without or in excess of jurisdiction in that it is not in accordance with the Forest Ordinance (Cap. 126) and/or the terms and conditions of the aforesaid Forest Timber Licence No. T/3070;
(f) that the respondents and each of them are not entitled in law and/or have jurisdiction to issue a licence and/or a permit over and/or to call for and accept a tender for a right to take forest produce from the licensed area comprised in the aforesaid Forest Timber Licence No. T/3070 to and/or from any person or body other than Clause 16 of the aforesaid Forest Timber Licence No. T/3070;
(g) the discretion conferred upon the second respondent to revoke the said licence is not unfettered. The second respondent exercised the said discretion arbitrarily and improperly when revoking the Applicant's aforesaid licence.

As the application for Order of Prohibition has been withdrawn ground (f) is no longer relevant.

Facts and Events Prior to commencement of Proceeding:

The facts and events that led to the applicant making the application for leave and subsequently the Notice of Motion may be gathered from the affidavit of Ting Sie Ing affirmed on 31 March 1987. They are as follows:

(i) the applicant is a private company limited by shares and carried on the business of, *inter alia*, trading in timber;
(ii) on 26 May 1981, the applicant was issued with a Forest Timber Licence No. T/3070 ("the said Licence") by the 2nd respondent in exercise of the power conferred on him by s. 55 of the Forests Ordinance ("the Ordinance") with the approval of the 1st respondent;
(iii) the duration of the said Licence was from 26 May 1981 to 25 May 1991;
(iv) the said Licence covered an area of 48,763 hectares of the Belaga-Balui State Land Forest;
(v) the said licence was issued subject to terms and conditions set out therein, *inter alia*, it provided that the 2nd respondent may by giving three months notice in writing terminate the said Licence in the event of the applicant failing to comply with any of the terms and conditions stipulated therein. The applicant says that it had complied with all the terms and conditions stated in the said Licence at all material times;
(vi) by a letter dated 11 March 1987 written by the 2nd respondent to the applicant ("letter dated 11 March 1987") the applicant says that the 2nd respondent unlawfully revoked the said Licence. In consequence thereof an application for leave was made for the aforementioned orders which was granted on 8 April 1987.

Subsequent events after commencement of Proceeding:

Before I consider the arguments of Counsel for the parties it may be appropriate to take note of some of the material events connected to this proceeding that arose after the issuance of the said letter dated 11 March 1987 and after the grant of the leave on 8 April 1987 as gathered from the affidavit of Datuk Leo Chai sworn to on 29 August 1992, and the affidavits of Ting Sie Ing affirmed on 15 September 1992, 30 October 1992 and 4 November 1992 respectively and the affidavit of Henry Lau Lee Kong sworn to on 4 November 1992. They are as follows:

(a) on 13 March 1987 a new licence (No. T/3190) was issued to Sarawak Timber Industries Development Corporation (STIDC) by the 2nd respondent with the approval of the 1st respondent which commenced on 13 March 1987 and expired on 25 May 1988 and covering the forest area of the said Licence (No. T/3070);
(b) the applicant filed a Civil Suit No. KG.482 of 1987 against Kastima Lumber Sdn. Bhd. ("Kastima"), its then logging contractor and obtained an interlocutory injunction on 12 December 1987 against Kastima;
(c) on 6 April 1988 an agreement was signed between the applicant and Kastima upon which the interlocutory injunction was subsequently discharged on the application by applicant;
(d) by a letter dated 1 July 1988 from the then solicitors of the applicant, Messrs. Chew, Jugah, Wan Ullok, Goh & Co. to the 2nd respondent, it was stated in the said letter that the applicant had no objection to Kastima going into the forest area comprised in the said Licence (T/3070) and to extract and remove merchantable timber therefrom as agent and contractor of the new licensee. The 2nd respondent acknowledged and replied the said letter on the same date, that is, 1 July 1988. It is the contention of the 2nd respondent that the new licensee referred thereto was STIDC. It is to be noted however that the licence No. T/3190 issued to STIDC expired on 25 May 1988.

The Issues:

At the commencement of the hearing the learned State Attorney-General, Mr. J.C. Fong appearing for all the respondents submitted to the Court that the only issue to be considered should be and I quote:

> On the basis that the revocation or forfeiture of Forest Timber Licence No. T/3070, effected by the Director of Forests without first giving the applicant an opportunity to explain the event invalidating the said Licence, is invalid (as decided by the Supreme Court in *Minister for Resource Planning & Ors. v. Keruntum Sdn. Bhd. [1988] 2 MLJ 226);* whether this Court should, in the exercise of its judicial discretion, grant the Applicant the Order of *Certiorari*.

Mr. Fong tendered a separate document containing the issue which he said was to be considered. It was accordingly marked "A". Learned Counsel for the applicant has no objection to the content of "A" provided it could be recorded that the respondents have conceded and confirmed to the invalidity of the revocation due to it being effected by the 2nd respondent without first giving the applicant an opportunity to explain the event invalidating the said Licence. In reply Mr. Fong said that document "A" was self-explanatory and for the reasons given in the *Minister of Resource Planning & Ors. v. Keruntum Sdn. Bhd. (supra)* the respondents (and I quote the words of Mr. Fong) 'accept the fact that the revocation of the Licence No. T/3070 is invalid'.

After considering all the points raised in the arguments of Counsel for the parties the two main questions that must necessarily be asked are:

(a) Upon the admission by the respondents of the invalidity of the revocation of the said Licence for the reason stated, should an Order of *Certiorari* be granted?
(b) If the answer to (a) is in the affirmative, should it be granted in view of the expiry of the said Licence in question?

I will deal with the questions of waiver and conduct of applicant raised by the learned State Attorney-General, if necessary, after these two questions have been determined.

(a). *Admission of the invalidity of the revocation of the said Licence by the respondents: Should an Order of Certiorari be issued?*

This question may be examined and determined from the following aspects:

(i) *Effect of admission of invalidity of an impugned decision:*

It is obvious that the reason given by the respondents for admitting that the revocation of the said Licence is invalid is due to the failure of the 2nd respondent to observe the rules of natural justice. And it has been said in several leading authorities that a decision made in breach of the rules of natural justice is a nullity. See: *Anisminic v. Foreign Compensation Commission & Anor.* [1969] 2 AC 147; *O'Reilly v. Mackman* [1982] 3 All ER 1124. But must anything be done to such a decision? In *B. Mahesan v. K.K. Lim* [1987] 2 MLJ 160 the question was left unanswered whether it is appealable or just void and thus not subject to appeal at all a decision of a judicial tribunal acting within its jurisdiction arrived at in a way which amounts to a denial of natural justice. I am inclined however to agree 'that a decision made contrary to natural justice is void, but that, until it is so declared by a competent body or Court, it may have some effect, or existence, in law. This condition might be better expressed by saying that the decision is invalid or vitiated' per Lord Wilberforce in *Calvin v. Carr* [1980] AC 574 (PC) at p. 589 H. [See also: *London & Clydeside Estates Ltd. v. District Council and Anor.* [1979] 3 All ER 876].

A similar view even in respect of a non-statutory body was also expressed by Aickin J. in *Forbes v. New South Wales Trotting Club Ltd.* [1978-1979] 143 CLR 242 at p. 277 when he said:

> That which is done without compliance with applicable principles of natural justice, in circumstances where the relevant authority is obliged to comply with such principles, is not to be regarded as void *ab initio* so that what purports to be an act done is totally ineffective for all purposes. Such an act is valid and operative unless and until duly challenged but upon such challenge being upheld it is void, not merely from the time of a decision to that effect by a court, but from its inception.

But where there is an admission of invalidity of an impugned decision must the Court do anything to the decision?

In *R v. Parole Board, ex p Wilson* [1992] 2 All ER 576, an appeal in connection with an application for a declaration, reference was made by Taylor LJ in the course of his judgment that the Divisional Court had set aside a decision of the Parole Board even though the Home Office had conceded earlier on the inadequacy of reasons given to the aggrieved party and had therefore supplied further reasons.

In *Forbes's* case *(supra)* by majority on appeal the declaration sought for was granted by the High Court of Australia although there was a further resolution made by the respondent, the New South Wales Trotting Club Ltd. that the impugned resolution would only cover its own courses and not elsewhere and also an undertaking that the consequences of the impugned resolution would not be effected. The Court was concerned with the wider consequences of the impugned resolution. It felt that the further resolution and undertaking did not sufficiently protect the appellant in the manner which he

was entitled to be protected from the consequences of the impugned resolution, one of which was the disqualification of the appellant to be a member of other trotting clubs under the control of the respondent as the 'controlling body'.

Although *Forbes's* case *(supra)* was on declaration and quite on different facts I think the principles of law therein are relevant. In the present case the respondents admit that the revocation of the said Licence by the 2nd respondent is invalid for reason stated in the document "A" and so it must be. Thus, whatever the presumption of validity of the revocation should be taken to have been rebutted by the admission. In effect therefore by reason of the admission the impugned revocation deserves no further acknowledgment. As such the primary purpose of this application can be said to have been achieved even before an Order of *Certiorari* is issued. But I do not think that a mere admission of invalidity of an impugned decision *ipso facto* excludes the discretion of the Court to grant an Order of *Certiorari*. In my view it depends on the effects of the impugned decision on the applicant if it is not quashed by the Court. Where there would be wider consequences [as in *Forbes's* case *(supra)*] or if I may term it as continuing negative effects upon the applicant even after the admission of invalidity an Order of *Certiorari* should be granted regardless of the admission. This is more so where third parties are not bound by such an admission resulting in the impugned decision continuing to have adverse effects on the applicant in relation with the third parties. At p. 282 of *Forbes's* case Aickin J said this:

> Moreover, other trotting clubs of which the appellant is a member, or of which he may seek to become a member, would not in any way be bound by an undertaking given by the respondent club and, although those of which he was a member have continued to treat him as a member, the warning off produced an automatic effect that he was in truth no longer a member. All these disabilities appear to me to be real, whether or not one takes the view that at the present time they are being ignored, and perhaps, unless there is some change in the circumstances, will continue to be ignored. I do not consider that this is sufficient to protect the appellant in the manner which he is entitled to be protected from the consequences of the invalid resolution.

In the present case however there is no indication and I do not find any evidence from the affidavits filed or from the submission of learned Counsel for the applicant which can be considered as the wider consequences or continuing negative effects of the impugned revocation on the applicant if an Order of *Certiorari* is not granted.

(ii) *Public law remedy and claim under Private law upon admission of invalidity of an impugned decision:*

In his submission learned Counsel for the applicant appears to say that the admission of the respondents is not good enough in this case as the primary objective of the applicant now is to claim for damages against the respondents for the unlawful revocation. In other words and if I understand the learned Counsel correctly, the grant of an Order of *Certiorari* is a condition-precedent before the applicant can sue the respondents for damages. No authority is submitted in support for such a contention. But it is to be noted that what the applicant is seeking in this application is a remedy in public law. The contemplated action is under private law. As such it may be appropriate to note here what Lord Diplock said when he began his speech in *Gouriet v. Union of Post Office Workers* [1978] AC 435 at p. 496:

> My Lords, at the heart of the issues in these appeals lies the difference between private law and public law. It is the failure to recognise this distinction that has in my view led to some confusion and an unaccustomed degree of rhetoric in this case.

In *Cocks v. Thanet District Council* [1982] 3 All ER 1135 Lord Bridge of Harwich in the course of his speech was of the opinion that the provisions of the statute he was dealing with, namely, Housing (Homeless Persons) Act 1977 required the establishment of a public law decision before private law remedy could exist. He said this at p. 1138 d:

> But it is inherent in the scheme of the 1977 Act that an appropriate public law decision of the housing authority is a condition-precedent to the establishment of the private law duty.

Further down on the same page his Lordship said this:

> ... that once the existence of a duty resting on a housing authority under the 1977 Act to provide accommodation, whether temporary or permanent, has been established, an action for damages for breach of that private law duty lies.

The contemplated action of the applicant in this case will be, in the words of learned Counsel for the applicant, 'a claim for damages against the respondents on account of breach of contract'. Ordinarily it entails the prior determination of the validity of the revocation of the said licence by the 2nd respondent. But here we have the admission of the respondents that for the reason stated therein the revocation of the said Licence is invalid. Thus I do not think the contemplated action will involve any issue of public law as a live issue. In my view the position of the applicant may be similar to that of the plaintiff in *Davy v. Spelthorne Borough Council* [1984] 1 AC 262. In that case the plaintiff by way of ordinary action against the defendants, a public body, sought for, *inter alia*, an injunction ordering the defendants not to implement the enforcement notice and damages for negligent advice. The plaintiff had been served earlier on with an enforcement notice by the defendants in respect of his use of premises within the defendants' area. The plaintiff alleged that he did not appeal against the notice as a result of negligent advice given by the defendants or their officers. The defendants applied to strike out the action contending that public law was involved namely, a challenge on the validity of the enforcement notice. As such the defendants contended that the action should have been under O. 53 of the English Rules of the Supreme Court. In fact the plaintiff was no longer challenging the validity of the notice. The claim for injunction was struck out but not the claim for damages as their Lordships were of the opinion that the claim was simply an ordinary action for tort since the validity of the enforcement notice was no longer disputed by the plaintiff. Lord Fraser of Tullybelton said this at p. 273 E - G:

> Although the argument was presented most persuasively, it is in my view not well founded. The present proceedings, so far as they consist of a claim for damages for negligence, appear to me to be simply an ordinary action for tort. They do not raise any issue of public law as a live issue. I cannot improve upon the words of Fox LJ in the Court of Appeal when he said [1983] 81 LGR 580, 596:
>
> > I do not think that the negligence claim is concerned with 'the infringement of rights to which (the plaintiff) was entitled to protection under public law' to use Lord Diplock's words in *O'Reilly v. Mackman* [1983] 2 AC 237, 285. The claim, in my opinion, is concerned with the alleged infringement of the plaintiffs' rights at common law. Those rights are not even peripheral to a public law claim. They are the essence of the entire claim, so far as negligence is concerned.

Similarly in the present case the validity of the revocation of the said Licence is no longer in dispute. The contention of the learned Counsel for the applicant would have been a point to consider if the respondents made no admission as to the invalidity of the revocation of the said Licence. It is therefore my view that given the circumstance of this case it is not necessary and not a condition precedent that an Order of *Certiorari* should be obtained before the applicant can pursue its claim for damages under private law.

Accordingly for the foregoing reasons the answer to the above question is in the negative and in the exercise of my discretion I therefore refuse to grant this application for an Order of *Certiorari*.

(b). Expiry of the said Licence: Should an Order of Certiorari be issued?

In view of the conclusion I have arrived at on the preceding question I do not think it is necessary for me to go into great details in dealing with this question. I shall therefore proceed concisely in dealing with the arguments and the law as submitted. But before that I must state with regret that I find little assistance coming from Counsel for the parties on this question.

Learned Counsel for the Applicant merely contends that the expiry of the said Licence is irrelevant in considering whether or not an Order of *Certiorari* should be issued by this Court. Whereas, the learned State Attorney-General argues without any clear authorities that even if an Order of *Certiorari* is granted there will be nothing to rectify as the said Licence has expired and cannot be restored. I must however state here that I have reservations on the correctness of such a contention. An Order of Certiorari is to quash an impugned decision. If an applicant wishes rectification or re-determination of a matter he will have to seek for other remedies such as *mandamus*. See: *Cocks v. Thanet District Council (supra)*.

Be that as it may, the expiry of a licence or a permit of an applicant does not *per se* exclude the remedy of *Certiorari*. Courts have granted the Order of *Certiorari* although licences or permits have expired. This is particularly so where there may be adverse or wider consequences or

continuing negative effects to the applicant if the impugned decision is not quashed. However, it appears that there is no local authority on this point.

In *Ratilal Bhogilal Shah v. State of Gujarat & Ors.* [1966] AIR Guj. 244 the order of cancellation of the fire-arm licence of the petitioner was quashed even though the fire-arm licence had expired. The reason for doing so was that if the order was allowed to stand the petitioner would be prejudiced in two ways, namely (a) there would be ignominy of the charge that the petitioner was guilty of something which was prejudicial to the security of public peace and (b) his chance of procuring a fresh licence would be greatly prejudiced. In another case of *Kashi Prasad v. State of Uttar Pradesh* [1967] AIR ALL. 173 the order of removal of the petitioner's name from the register of Notaries was quashed even though the petitioner's certificate to practise had expired for that particular term. The reason given for doing so was that the petitioner was entitled for renewal of his certificate and so long as the order remained the petitioner could not apply for renewal. In *Jogesh Chandra Roy v. State of West Bengal & Ors.* [1968] AIR Cal. 528 a writ of *Certiorari* was issued to quash the order passed by the Minister granting the licence to sell liquor to another person instead of the petitioner even though the period of that licence which was sought for by the petitioner had long been over. The reasons were that if the order of the Minister was allowed to remain there would be the likelihood that the petitioner would never be considered eligible to apply for licence for any future year. Further, the observations of the Minister in the impugned order had cast a stigma on the petitioner's character and made him appear to be unreliable for any public business.

In these foregoing cases the Indian Courts in granting the writ of *Certiorari* gave serious consideration to the adverse or wider consequences or continuing negative effects of the impugned orders upon the aggrieved persons although their licences or permits had expired. Such approach is similar to where there is an admission of invalidity of an impugned decision. I am of the view that I should adopt a similar approach. But I find no submission or any evidence adduced in the present case on the adverse or wider consequences or continuing negative effects of the impugned revocation on the applicant if an Order of *Certiorari* is not granted. The only reason given, as I have earlier on noted, is to enable the applicant to decide on its contemplated action for damages for breach of contract. I do not think such a reason can be considered to be within the category of or a cause of adverse or wider consequences or continuing negative effects as illustrated in the cases I have referred to above. Indeed in the case of *K.N. Guruswamy v. The State of Mysore & Ors.* [1954] AIR 592 SC an application for a writ of *certiorari* on appeal was refused by the Supreme Court of India on the ground that it would be ineffective due to the expiry of the excise year for the particular contract. In that case the appellant was a liquor contractor. In an auction conducted by the Deputy Commissioner of Excise the appellant was the highest bidder. His rival liquor contractor did not bid but later went to see the Excise Commissioner who cancelled the sale held by the Deputy Commissioner. Subsequently the Deputy Commissioner issued an order accepting the tender of the rival liquor contractor. The appellant took up the matter to Court but by the time the appeal was heard by the Supreme Court the excise year for the particular contract, the subject matter of the action, was about to expire. The Supreme Court declined to give the order sought for. Bose J. delivering the judgment of the Court said this at p. 596:

> We would therefore in the ordinary course have given the appellant the writ he seeks. But, owing to the time which this matter has taken to reach us (a consequence for which the appellant is in no way to blame, for he has done all he could to have an early hearing), there is barely a fortnight of the contract left to go. We were told that the excise year for this contract [1953-1954] expires early in June. A writ would therefore be ineffective and as it is not our practice to issue meaningless writs we must dismiss this appeal and leave the appellant content with an enunciation of the law.

Similarly in the present case the said Licence has expired since 25 May 1991. Further, from the events which happened after leave was granted it is obvious that the applicant is no longer interested in claiming the forest area once covered by the said Licence or for the renewal of the said Licence as it has agreed for other parties to work on the area under a new licence. As such an Order of *Certiorari* would be ineffective and meaningless. Accordingly the answer to the above question is also in negative and on this ground as well I refuse to grant the application in the exercise of my discretion.

Waiver and Conduct:

In view of the conclusions that I have come to on the two main questions I do not think it is therefore necessary for me to consider in detail the other issues submitted by the learned State Attorney-General, namely, on the question of waiver and conduct of an applicant in relation to a grant of an Order of *Certiorari*. Suffice to say that the admission of the respondents on the invalidity of the revocation of the said Licence for reasons stated thereof has weakened considerably the argument of the learned State Attorney-General.

Costs:

I now come to the question of costs. I must state that this issue has made me ponder as to where fairness lies. On the one hand the applicant can be said to have succeeded as the respondents have made the admission. On the other hand no Order of *Certiorari* is granted for the reasons stated hereinabove. But these two factors deserve consideration, namely:

(a) no explanation from both sides as to why nothing was done to this case even after the decision of the Supreme Court in *Minister of Resource Planning & Ors. v. Keruntum Sdn. Bhd. (supra)*; and

(b) it is not within the sole control of the applicant to have the hearing of this application heard before the expiry of the said Licence. Learned Counsel for the applicant says that several requests were made to have this application heard before the expiry of the said Licence.

Accordingly I think the fair thing to do in the circumstances is that in the exercise of my discretion I make no order as to costs. This application of the applicant is therefore dismissed with no order as to costs.

ESTET PEKEBUN KECIL SDN. BHD.

v.

SYKT. SIN KIAN FATT ENTERPRISE SDN. BHD.

HIGH COURT, JOHORE BAHRU
DATO' HJ. ABU MANSOR BIN ALI J.
[CIVIL SUIT NO. 284 OF 1984]
14 DECEMBER 1992

CONTRACT: Agreement for sale and purchase of palm oil fruits - Accord and satisfaction - Set-off - Counterclaim for payments wrongly made - Allegation of trading in palm oil without a licence.

The plaintiffs claimed for payments due on various quantities of palm oil fruits and kernel sold to the defendants for which payments had not been made amounting to RM251,983.64.

The defendants set up the defence of accord and satisfaction and claimed that the plaintiffs had accepted a lesser amount in satisfaction of the debt. The defendants also counterclaimed for payments wrongly made and/or over-payment. The defendants also alleged that the plaintiffs were trading in palm oil without a licence.

Held:

[1] There was no accord and satisfaction. The account compiled by the defendants was received by the plaintiffs in order to enable the accounts department of the plaintiffs to verify the same and not as satisfaction of the amount actually owing.

[2] The defendants had been consistently paying the demands of the plaintiffs in accordance with the terms "mengikut harga PORLA" which is a well known term in the palm oil industry and there were no grounds for the defendants to refuse to pay.

[3] The evidence showed that the plaintiffs were in fact in possession of a licence to trade in palm oil at the material time.

[Plaintiffs claim allowed with costs. Defendants counterclaim dismissed with costs].

Legislation referred to:
RISDA Act 1972, s. 6(2) (b), (c)

For the plaintiff - Dulip Singh; M/s. Dulip Singh & Co.
For the defendant - Bernatt; M/s. S.T. Lee & Partners